

# EQUAL OPPORTUNITIES AND LEGAL EDUCATION: A MAINSTREAM PERSPECTIVE

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## Abstract:

*This article aims at discussing the role of legal education in spreading awareness about gender issues amongst legal operators, judges and public administrations and institutions. In particular, the authors investigate the methodologies of integration of 'gender skills' in legal curricula.*

*Asking why and in what form sexism is found in legal education, and starting from criticisms from the gender perspective, the paper studies the inadequacies of legal education with respect to gender from the point of view both of the structural limits of common methodologies and of specific discriminatory attitudes in present teaching activities, curricula and courses.*

*Lastly, it attempts to propose some methodological innovations in legal education, aimed at opposing the predominant indifference towards considering gender as a legal matter. Specially: (1) a cross teaching of gender topics in (existing) general courses; (2) the inclusion of gender topics within (existing) general courses on fundamental rights; and (3) the growth of specific courses on law and gender.*

## Keywords:

Legal education, gender, teaching, sex discrimination.

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## I. INTRODUCTION

The main research question of the paper concerns the understanding and discussion of the role of legal education for the promotion of a gender awareness amongst legal operators and society as a whole. Starting from a description of the unsatisfactory Italian scenario of indifference and biases towards gender issues, this essay aims at analysing the possible integration of what we call ‘gender skills’ in legal programs and curricula.

The Italian context represents for us a case-study, relevant from various points of view: first of all it clearly constitutes an example of the negative impact that a gender-blind education produces on the recognition and implementation of equal opportunities in family, society, politics and work. Stereotyping and sexist education from the very beginning of a child’s integration into the educational and social setting contributes to determining the widespread perception that women are of a lower status, shaped through their role within family and their function as caregivers. The relationship between a gender-blind education and the common perception of a feminine lower status seems to be double-sided: from one side this kind of education represents one of the reasons for women’s lower status, while from the other it is one of the many consequences of the lower social status of women.

The recent legislative interventions in Italy concerning equal opportunities evidence on the one hand the growing awareness of the necessity to take measures directed to rebuilding women’s status and promote a gender culture; on the other hand the enduring lack of political will to implement a long-term plan on gender equality and go beyond the traditional approach towards equal opportunities. We can

therefore ask where this political and legislative attitude originates and whether it influences social perceptions and ideologies. This is the ‘connecting tissue’ of the work; lawmakers, politicians and administrators are strongly influenced by the education they have received, and they have chiefly received legal training that instead of placing the foundation stones for the promotion of culture and behaviour enabling equal opportunities, has instead passed down to them an abstract and ‘aseptic’ concept of law and justice. The effect of this phenomenon is twofold: firstly, legal actions, norms and rules infrequently use a gender perspective as a lens to read and understand the social context. Secondly, and as a consequence, the social context itself converts this gender-indifferent (and often discriminatory) legal language into a general background for values that are to be found at all levels of education and training.

Based simply on the importance that we assign to legal education and its (even indirect) social and cultural impact, it seems interesting to compare the Italian scenario of legal education with the American scenario and more generally the common law approach to legal education. This is because such a comparison will allow us to investigate whether and how the integration of gender in legal education could follow the same methods and contain the same content in the two different scenarios.

The research takes the following structure in order to pursue these objectives. In Section 2, we try to answer the question of whether gender matters in Italy; in Section 3 we analyse the role of the Italian lawmakers in strengthening gender biases through legal norms, studying briefly the most significant statutes adopted (during the last legislature) in some fields variously linked with across-the-board gender issues. In Section 4, we investigate why and how sexism characterises legal education, starting from criticisms of legal education from the gender perspective. We study the inadequacies of legal education with respect to gender, from the point of view both of the structural limits of common methodologies and of specific discriminatory attitudes in present teaching activities, curricula and courses. Finally, we propose some methodological innovations in legal education that could improve the situation.

## II. GENDER BIAS AND THE LAW IN ITALY

### 1. Does gender matter in Italy?

Jurists and legal scholars are generally indifferent towards the issue of equal opportunities for men and women; a very small number among them deal with gender issues, and almost all the scholars engaged with these issues are women. The methods that characterise the approach to gender issues are also significant: very often topics concerning gender are taken into consideration separately and autonomously, as if they were distinct fields of study, and gender issues are not included at all in legal reflections when teaching topics where a gender perspective is, strictly, relevant.<sup>1</sup>

For instance, in scientific and academic meetings or seminars on the electoral system (which are very common nowadays in Italy), it does not often happen that speakers discuss the mechanisms that can assure equal opportunities in order to promote the political participation of women. Their main aim is to enforce the accountability of the government and its centrality within the institutional system, through electoral mechanisms that, without modifying the text of the Constitution, assign to the winner of the political competition a large number of seats, using a first-past-the-post system (with proportional correctives) or single-member constituencies.

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<sup>1</sup> A significant example comes from the reading of the main handbooks of legal disciplines in the Italian academic context: they never take into consideration gender as a general point of view by which investigate norms, cases and build a theoretical framework. Constitutional Law, Private Law, Criminal Law, Social Law and Labor Law, are all explained and taught without any reference to the gender perspective. Many are the question that academic handbooks do not pose, and we can find only sporadically in articles and monographs that facially deal with gender issues and topics. For instance: how much the social and political status of women affected the evolution of political representation in the Italian institutional system? In which way the constitutional protection of civil and social rights and liberties has had an effect on women and their role? Have family law and all the rules concerning marriage, children and relationships within the familiar context influenced and been influenced by the social perception of women? Does criminal law dedicate a specific attention to 'gender crimes'? And what kind of impact could have on the criminal system the present incorporation of peoples and groups that ground their legal system of values on the consideration of a lower juridical and social status for women? To what extent will the reform of the labor market and the social security contribute to a general reassessment of women's role and could it produce some discriminations?

Irrespective of the choices and the preferences expressed, the question of the need to establish anti-discriminatory measures in order to guarantee an equal presence of men and women within the electoral lists (in the case of multiple-members constituencies), or an equal number of candidates of each sex (in single-member constituencies), has in any case a secondary (or low) relevance. This lack of relevance remains even though in very recent years some interesting provisions have been adopted to promote gender equality and the courts have gradually started to change their point of view.

Here, we can refer to Law l. n. 120/2011, containing provisions that establish penalties (such as the dissolution of the governing body of a listed corporation) for discrimination and to various anti-discriminatory measures for the governance of local authorities (provisions concerning local electoral systems such as the ‘double gender preference’ and some others regarding the composition of local government bodies).

The administrative tribunals have developed some strong principles in their decisions to disband local authorities whose members were all of the same sex or which were evidently gender unbalanced. These tribunals have said that:

governmental bodies when unbalanced in gender representation underline a lack in democratic representation of the heterogeneous composition of social background and electoral body [...] they are potentially not fully functional lacking the contribution of the gender that is not adequately represented.<sup>2</sup>

The Italian Constitutional Court<sup>3</sup> has affirmed that Article 51 of the Italian Constitution (as modified in 2003) requires, as right and proper, actions to be taken that are directed at guaranteeing equal access to elections. Evaluating the ‘double gender preference’<sup>4</sup>, the Constitutional Court has affirmed that this mechanism is coherent with the goal of the effective and concrete implementation of the equality principle, which has not yet been fully implemented in political and

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<sup>2</sup> TAR Lazio, n. 6673/2011, and TAR Lazio n. 633/2013, where the threshold of 40% is set as the minimum presence of each sex in local government bodies.

<sup>3</sup> Constitutional Court decision n. 49/2003.

<sup>4</sup> Constitutional Court decision n. 4/2010.

electoral behaviour and procedures. Finally, decision n 81/2012 explicitly declares that a requirement for gender balancing that is established by the law (the law at issue was the Regional Statute of Campania) must be in harmony with the Constitution.

In spite of these significant steps, the prevalence of indifference as the main attitude towards gender issues is demonstrated by numerous examples that are slowly coming to light after recent political and institutional events. We can mention for example the documents produced by the Committee of Experts nominated by Prime Minister Enrico Letta in 2013 to give details about a proposal to reform the Second Part of the Constitution. Reading the preparatory works, it is possible to verify the marginal role assigned to gender issues in the representation, participation and composition of institutional bodies.<sup>5</sup> We can also find something in the recent Bill adopted by the Senate in order to significantly modify the Constitution, and in particular the parliamentary system (although this may require further readings before entering into force): therein, Article 1, amending Article 55 of the Italian Constitution establishes that statutes containing the electoral system for Parliament will promote the balance between men and women in their representation. This weak provision joins on to Article 51 that declares the equal opportunities between men and women in the access to the public offices, even elective, and gives to the Republic the task to promote equal opportunities between men and women. The more recent events concerning the adoption by Parliament of the new system for election to the Chamber of Representatives clearly demonstrates the (guilty) indifference towards the inclusion of anti-discriminatory provisions in a text that directly affects the level of political participation of women and their presence in the higher political institutions.

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<sup>5</sup>In the final report (Presidenza del Consiglio dei Ministri, Italian Government, 'Per una Democrazia Migliore' [2013], 70), we find only few words concerning gender issues, regarding in particular the electoral system, where the Commission proposes: (1) in case of choosing a proportional system, to provide a 'double gender preference'; and (2) in case of choosing a majority system, a gender provision on the 'gender balance' (32). These are the only references in the written report, although many other and significant proposals had been supported by the women within the Commission during the preparatory works (one of the authors of this paper, Elisabetta Catelani, was member of the Commission).

Despite the opposition of women in Parliament, who in symbolic ways also displayed their aversion to the unsuitable (and wrongful) decision not to include in the statute anti-discriminatory norms and percentages of women to be included in the lists of candidates by the political parties, the bill sent to the Senate does not contain any provisions on equal opportunities.

Furthermore, the general content of the statute would damage not only the democratic representation as a whole, but also the empowerment of merit and gender competences: there are to be closed lists, without preferential voting, and no provisions for binding or compulsory primary elections for the selection of candidates.

From this background, the main question that arises is: what are the causes of this indifference and, as is often the case, intolerance towards gender issues? How can legal education represent an instrument for settling these issues in society and public debate and awareness?

## **2. The role of lawmakers in reinforcing gender bias**

In this section, before focusing on the issue of sexism in education and the role of gender issues in legal education, we will discuss the role of lawmakers in strengthening certain gender biases through legal norms, and we will identify and understand gender biases, considering how and to what extent they influence the general approach towards gender issues in the social and public environment. We have chosen to start from the point of view of the lawmaker because we believe that this strongly influences social behaviours and perceptions and, establishing norms and rules, also builds the grounds for the interpretative activity of the judiciary. Moreover, the relationship between legal education and the role of the lawmaker emerges even from the factual verification that a significant portion of lawmakers is represented by people with legal *curricula* of studies.

To analyse this we will take into consideration the Italian State statutes adopted in the XVI and XVII legislatures.

The investigation of the legal provisions will be conducted according to a list of indicators, including: (a) the use of gender-related stereotypes and preconceptions; (b) the assumption of the immutability

of gender identity; (c) the media relevance of the particular statute; and (d) the inclusion of positive actions for the promotion of equal opportunities in the field of the statute.

a. *Social care, pension law, insurances, social benefits*

This field is very relevant in Italy when looking at sexual discrimination imposed by the law. The European Commission has just opened an infringement procedure against Italy concerning the norm that establishes a gap between men and women in the pension contributions that they need to have deposited in order to take early retirement.

In 2010, the European Commission began a dispute with Italy that was grounded on the specific regulation for public employment. At that time, the Italian Government faced the question of adopting legislative reform that shifted the retirement age for women to 65 years.

The decision of the CJEU of the 18<sup>th</sup> of November 2010 in Case C-356/09<sup>6</sup> underlined the fact that a public employer was able to dismiss an employee who had reached retirement age in order to promote the professional inclusion of younger personnel: this condition would give an advantage of five years to women, who would reach retirement age before men.

The recent infringement procedure<sup>7</sup> is directed towards law n. 214/2011 (Article 24 of the governmental decree n 201/2011, which was ratified by Parliament with amendments), that establishes a different minimum number of years of contributions for men and women to take early retirement. Recent proposals made by the Italian Government led by Matteo Renzi would neutralise the gap, but for the moment it is interesting to analyse the statute with respect to two of the four parameters listed above: a. the use of gender-related stereotypes and preconceptions; and d. the inclusion of positive actions for the promotion of equal opportunities in the field of the statute adopted.

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<sup>6</sup> Case C-356/09 *Pensionsversicherungsanstalt v Kleist* [2010] ECR I-11939.

<sup>7</sup> We refer to the procedure n. 2013/4199, challenged by the European Commission because of the incompatibility with Article 157 of the Treaty which establishes that the wage for workers will be equal for men and women, and Directive 2006/54/CE (Articles 5, 7 and 14). These last provisions provide that the access to retirement pensions cannot depend on the sex of the worker.



Concerning point (a), we could say that a gender-related stereotype and social preconception is at the basis of this statute. Indeed, the different conditions for (early) retirement (there is a more general differentiation between men and women in policies on retirement taken as a whole) assume that men and women have a different status; there is no immediate ‘biological’ cause for this and, indeed, if we remember that on average women live for longer than men, that would lead to exactly the opposite solution to the issue. This preconception considers the different role of women in care-giving activities and, above all, their exclusive (or, at least, dominant) role in assisting the elderly: the scenario that is assumed is that a woman leaves work, retires, and starts to assist her parents. Unfortunately this scenario corresponds to a real social context, and the stereotype has become a protective habit for women, who often have no choice because of the serious lack of public social services and support in managing vulnerable people such as the elderly and children.

In many other European countries, a differentiation between men and women in terms of retirement age can be evaluated as unreasonable discrimination that apparently (and maybe concretely) worked in favour of women, but was largely able to stereotype them in their social and familial role.

Moving to point (d), in Italy the provision could be interpreted as a reasonable discrimination the function of which was to allow a better balance between work and familial engagement. In fact, this is not an ordinary way to reach a balance, because in this case the woman's work stops and the greatest weight is assigned to the familial/social role. For the same reasons, the provision cannot be considered as an affirmative action: the legislative intervention does not introduce a policy of providing special opportunities for women, favouring them, or of allowing them to do or participate in something, to be represented (quotas), or to be preferred and incentivised to realise an initiative.

b. *Fundamental rights and freedoms*

In this field we can take into consideration law n. 119/2013 regarding ‘Gender Violence’, which was adopted after the ratification and execution of the Convention of Istanbul of the 11<sup>th</sup> of May 2011, under law n. 77/2013. This statute contains the ratification of the

governmental decree on the criminalisation of domestic abuse, sexual assault, and stalking.

First of all, punishments for all crimes are increased when the offender's behaviour is directed at his or her spouse, even if they are separated or divorced, or at his or her partner. Secondly, some provisions have been introduced regarding stalking. The offence of stalking has been widened to include aggravating circumstances, acts perpetrated against the offender's spouse, and every kind of act committed using information and communication technologies; moreover, law n. 119/2013 establishes that the charge of stalking in the case of 'serious and continual threats' (for instance made by the use of weapons) cannot be withdrawn.

Particular attention should be paid to this last provision, because in the first version of the decree there was no possibility of the charge being withdrawn, while now it is possible for this to be done except in cases in which the threats are repeated. The Supreme Court of Cassation has expressed some doubt about introducing this modification by a ratifying parliamentary statute, even if it is established that the withdrawal of the charge is merely procedural. The rule means that the judge will effectively have to assess whether the withdrawal is voluntary, but withdrawal by the judicial police or special lawyer would be accepted: the rationale for the rule is to prevent illegal influence being used on the victim, and this is strongly supported by the Court of Cassation, which considers the definitive provision adopted by the lawmaker to be inadequate.<sup>8</sup>

Using the indicators set out above, we can underline some relevant features:

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<sup>8</sup> The Court of Cassation also decided that the redefinition of stalking is a positive step (Court of Cassation, Massimario Office, Report on law n. 119/2013, 16.10.2013): until this statute was passed, law n. 11/2009 restricted the crime to offences by a separated or divorced spouse or the former partner of the victim, whilst now the only requirement for the crime of stalking is an emotional bond between the stalker and the victim. Many scholars (T Padovani, 'Quel Collasso dei Codici 'Figlio della Rincorsa' all'ultima Emergenza' in *Guida al Diritto* (2013), 36) have criticised the vagueness of this notion, and the risks of vagueness in criminal law are well-known, but we will come back to this point in our analysis under the parameter c).

With regards to (a) (use of gender-related stereotypes and preconceptions) this legal instrument has a clear symbolic meaning, which is simply to break down the cultural stereotypes that have for many years allowed men to make women subordinate, using the discriminatory instrument of *jus corrigendi*. In this paper we do not aim to investigate the extent to which the symbolic and performative use of criminal law is compatible with the constitutional role of punishment and the protection of fundamental rights. However, we need to underline how the performative intention of the norm is, in this case, aimed at destroying the mechanisms of women's subordination. It is significant that in no part of the law is there introduced an express distinction between men and women in the application of the criminal descriptions, although it is clear that the legislative intent was to fight against the dramatic phenomenon of gender violence. Indeed, the term 'femminicidio' has been created in order to represent not only the fact that the victim of this kind of crime is always a woman, but also (and above all) that the crime is 'gender violence', because it is committed by a partner or former partner. The word 'femminicidio' has only existed in Italian since 2001<sup>9</sup> and the use of the word has spread since 2008.<sup>10</sup> The term, created by Diana Russel and spread by Marcela Lagarde, means 'the murder of a woman because she is a woman', and has recently also been used in the case law of the Court of Cassation (Sez V, 9<sup>th</sup> April 2013, n 34016).

With respect to this point, the assumption of the immutability of gender identity (b) comes more from the public interpretation of the statute than from the statute itself. Indeed, an explicit exclusive reference in the statute to acts committed by men against women could have constituted a violation of the equality principle of Article 3 of the Constitution, given the strict boundaries of criminal law. From this point of view, the statute implicitly presupposes that it will apply largely or wholly to crimes against women, but it does not assume the immutability of gender identity, because it is directed against gender violence in total, as a form of violence that takes place against a person on the basis of gender.<sup>11</sup>

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<sup>9</sup> V Della Valle, 'Femminicidio', *Enciclopedia Treccani* (Treccani 2013)

<sup>10</sup> B Spinelli, *Femminicidio. Dalla Denuncia Sociale al Riconoscimento Giuridico Internazionale* (Franco Angeli 2008)

<sup>11</sup> Gender-based violence and violence against women are often used interchangeably because most gender-based violence is inflicted by men on women and girls (European Institute on Gender Equality). It is estimated that 20 to 25% of

European law has been moving in the direction of countering gender-based violence, through the Resolution of the European Parliament adopted on the 26<sup>th</sup> of November 2009 on the elimination of violence against women, and then with the Directives 2011/99/EU and 2012/29/EU.<sup>12</sup> The first of these introduces the European protection order and the second establishes minimum standards for the rights, support and protection of the victims of crime. The relevance of these acts lies in how they improve the legislation of Member States to counter all kinds of violence against women and to enforce all types of judgment and judicial decisions.

Finally, these Directives are included in a coherent and comprehensive set of measures on victims' rights that are particularly directed at protecting victims of gender crimes. In any case, in the approach to gender violence, gender construction prevails with respect to sexual identity in itself: the moral and psychological dimension is relevant in the definition of the conduct ascribed to gender violence.

With regards to (c) (the media relevance of the statute), we can say that it has had a strong presence throughout the media; the problem is the kind of interpretation that is given to the word 'femminicidio'. There is a sort of social trend that sees 'femminicidio' and violence against women as inexplicable events.<sup>13</sup> Why would an apparently *compos mentis* man kill the woman that he loves? Why would a young boy decide to imprison his girlfriend and submit her to continual abuses for three whole days? What reason leads a rich and powerful politician to attempt to carry out a rape? The media usually explains violent or murderous actions taken by men in various ways: asserting that too intense a feeling can produce such strong pain that it may lead to

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women in Europe have suffered physical violence, and that the number of women who have suffered other forms of gender-based violence is much higher.

<sup>12</sup> Resolution of the European Parliament adopted on the 26<sup>th</sup> of November 2009 on the elimination of violence against women [2010] OJ C285/53; Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order establishing a mechanism for the mutual recognition of protection measures in criminal matters between Member States [2011] OJ L388/2; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57.

<sup>13</sup> L Lipperini, M Murgia, *L'ho Uccisa Perché l'Amavo. Falso!* (Laterza 2013)

violence; holding that pain and suffering can be strong enough to ‘alter’ love and drive a man to violence; or affirming that the male sex drive can be so strong that it results in physical violence towards a woman.

Recently, it has been underlined that very few media reports assert that gender violence and ‘femminicidio’ are not the possible results of a ‘distorted’ love, but rather are the outcome of a cultural heritage that assigns a socially subordinated role to women, a role that even includes submission or physical elimination when a woman moves away from the social paradigm designed for her.<sup>14</sup>

The lawmakers have to take this social background into consideration, and laws can contribute to its reinforcement or weakening, through the creation of new paradigms of values and roles within society and family. The statute concerning ‘femminicidio’ tries to do this, but the use of the criminal law to further cultural and social goals has attracted much criticism, criticism that emphasises the (wrongful and hypocritical) idea that the law cannot be used to achieve equality between men and women.

The main feature in this field is that gender crimes do not have the same characteristics as other violent crimes: crimes against women can and should be considered separately because of their intrinsic particularity. This is just what is being done with the roadmap of European directives that try to harmonise the criminal law in the Member States by calling on them to improve their national laws and policies to combat all forms of violence against women, and to act to tackle the causes of violence against women, not least by employing preventive measures, and by calling on the EU to guarantee the right to assistance and support for all victims of violence.

c. *Political participation*

In this field some important norms were adopted in 2012. The law n. 215/2012 introduces three categories of provisions to the Italian legal system that can all be included in the legal phenomenon of affirmative action.

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<sup>14</sup> F Pischedda, *La Violenza Contro le Donne e il Sessismo Implicito nel Discorso Giornalistico Scritto*, Master Thesis dissertation, University of Bologna, 2013.

The first field of norms concerns the affirmative action that is required in order to promote an equal presence in all local political representative bodies, and also in other bodies called to assume relevant political and administrative decisions.

With respect to this first intervention, the statute modifies the provision of the code of local authorities - legislative decree n. 267/2000 - by establishing that the statutes of municipalities must include rules that guarantee the presence of both sexes in local government bodies and all non-elected collective bodies.

The second field of norms concerns elections, electoral systems and general principles. It requires that in municipal elections the lists must contain candidates of both sexes, and that not more than two thirds of the candidates can belong to the same sex. Every voter can express one or two preferences for a candidate on the list linked to the mayoral candidate: if the voter expresses two preferences, the second must be for a candidate of the different sex, otherwise the second preference is cancelled.

Moreover, the statute adds to Article 4 of law n. 165/2004 (providing principles that the regions should follow in setting up their electoral systems) a paragraph *c-bis* that introduces the objective of promoting the equality of men and women in access to political offices, through the provision of measures that allow the access of the under-represented gender in electoral offices to be prioritised. With regards to the general provisions concerning elections and, in particular, electoral campaigns, the statute adds to law n. 28/2000 a regulation establishing that when the media publish political communications, they have to act in compliance with Article 51 of the Constitution concerning the equal opportunities of women and men.

The third and last field is represented by Article 57, which modifies Article 61 of the legislative decree n. 9/1993 concerning public employment and establishes (amongst other provisions on equal opportunities for access and treatment at work) that public administrations must, except in the case of justified impossibility, appoint women to at least one third of the positions on examination boards. The nomination to the boards is overseen by the 'Consigliera

di parità', who can order the administration to remove the board when this rule has not been respected.

Recently, in April 2014, the Italian Parliament introduced quotas in the electoral system for the election of the Italian members of the European Parliament. From 2019, each list of candidates must contain no more than 50% of members of either sex, and the first two candidates must be of different sexes. The circuit election office will control compliance with this provision by the lists, and if more than 50% of the candidates on a list are of the same sex the office will reduce the list by cancelling the names of those candidates belonging to the most represented sex. Parliament also adopted a temporary measure for the next European elections to be held in May 2014: if a voter states three preferences (the number of votes is proportional to the preferences), both sexes shall be represented in the choices and a third same sex preference shall be invalid.

This legislative intervention represents an affirmative action: it should constitute the direct precedent for a more effective provision regarding the national electoral system and the composition of national governmental bodies. On the contrary, the important steps taken for local bodies, and the choices made for the European Parliament, do not correspond to an engagement by the lawmakers with guaranteeing equal opportunities and access to national representative organs. The (free) choice made by the current Prime Minister to compose his cabinet of an equal number of men and women seems to be of little importance, because it is evident that the relevance of the roles assigned to the women are actually inferior to those roles assigned to their male colleagues.<sup>15</sup>

### III. SEXISM AND LEGAL EDUCATION

In this paragraph we will investigate why and how sexism is found in legal education, starting from criticisms of legal education from the gender perspective. We will study the inadequacies of legal education

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<sup>15</sup> Seven are the women ministers: three among them are 'without portfolio' and two are charged with the traditional 'feminine' sectors, such as Education and Health. Only two women lead 'hard fields' (using of course an usual as arguable distinction): Economic Development and Defense. Nine are men, and all Ministers with portfolio. There are no women among the undersecretaries at the Government: four positions and four men.

with respect to gender, from the point of view both of the structural limits of common methodologies and of specific discriminatory attitudes in present teaching activities, curricula and courses. The grounds for all cultural education are definitely sexist, and recent studies have also underlined how the majority of books written for young girls and boys at primary school contain significant gender stereotypes.<sup>16</sup>

Sexism is a term that came into use in the sixties and seventies in the cultural field of American neo-feminism, and was inspired by the term 'racism'. It describes an arbitrary stereotyping of males and females based merely on the sex to which they belong.

Generally, investigations into the phenomenon of sexism focus on features of language, from two points of view: (i) the problem of how language is used to speak about women (the use of language); and (ii) the problem of what the linguistic system makes available to use when referring to women in discourse (by which we mean the morphosyntactic characters). In a wider sense - the sense that directly concerns our topic - linguistic sexism takes into consideration the image of women that emerges from linguistic practice and the increasingly evident contrast between the social achievement of women and the rigidity of a language built by and for men.<sup>17</sup>

#### **1. Which methodological innovations in legal education to go beyond sexism?**

The relationship between sexism and education ought to be considered from the specific perspective of legal education. Over recent years, a wide-ranging investigation has been of interest in the field of education, for two main reasons: the reform of academic curricula has, since the beginning of this century, imposed a new method of teaching law (caused by the shorter times available for lessons and courses), and new technologies have simplified but also modified teaching methodologies and communication between teachers and students.

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<sup>16</sup> I Biemmi, *Educazione Sessista. Stereotipi di Genere nei Libri delle Elementari* (Torino: Rosenberg & Sellier 2010)

<sup>17</sup> C Robustelli, 'Lingua e Identità di Genere. Problemi Attuali nell'Italiano', in *Studi Italiani di Linguistica Teorica e Applicata* (2000).



In Italy, two teams of scholars have studied these features. One of these is the group led by Orlando Roselli who has published a large number of books regarding legal education.<sup>18</sup> To having passed the exam in Family Law Reading these works, we find some up-to-date thoughts on the education of jurists that can be divided into three sections: (a) the role of the historical perspective in legal education; (b) the indivisibility of the legal sciences; and (c) the alternatives to the empirical approach and the theoretical approach. These three aspects will be summarised, and it will become apparent that the total absence of a gender perspective from these studies corresponds to a strong correlation between them and the need to integrate gender into legal education.

(a) With regards to the role of the historical perspective in legal education, we can start from the statement of Paolo Grossi, who wrote that the real jurist is not a mere technician of law, but is able to collocate the legal phenomenon, in its very nature as a social science, all along its historical evolution, using the past in order to understand the present and the possible future developments.<sup>19</sup>

This teaching is greatly neglected by our legal educational system, where the teaching of ‘History of Law’ is definitively distinguished from the teaching of substantial law.<sup>20</sup> In the following pages we will underline the extent to which the historical perspective is basic to the ‘genderisation’ of education, in terms of the necessity of rethink legal history and the role of law in its historical evolution in producing cultural and social norms.

(b) The differences that exist between the various legal disciplines, and, consequently, between the different approaches to teaching them, should not obscure the unitary nature of legal science. All legal teaching should aim for this objective and should sacrifice at least some of the sectorial approach in order to promote the unitary matrix

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<sup>18</sup> O Roselli, *Scritti per una Scienza della Formazione Giuridica* (Napoli: Edizioni Scientifiche Italiane 2012).

<sup>19</sup> P Grossi focused on this issue in various works, especially in ‘La Formazione del Giurista e l’Esigenza di un Odierno Ripensamento Metodologico; in V Cerulli Irelli and O Roselli (eds), *La Riforma degli Studi Giuridici* (Edizioni scientifiche Italiane 2005), 31, and P Grossi, *Prima Lezione di Diritto* (Laterza 2003).

<sup>20</sup> This is different from what happens in Germany, where history is an essential part of legal education as a whole (ibid).

of all the legal fields. It is evident that, in this context, gender mainstreaming could find a clear realisation because the deepening of gender issues would pass through all the possible legal scenarios and affect the various articulations of laws and rights.

(c) The controversy between the empirical and the theoretical<sup>21</sup> approach is long-standing, and maybe unsolvable. We should emphasise the need to build on an exclusively theoretical legal training (typical of the civil law systems) by integrating this into a practical context of the evaluation of concrete cases, trying to make students understand how legal norms operate within the social system. This point becomes crucial not only with regards to legal education directed at the training of lawyers, attorneys, judges, and notaries, but also when education is directed at training public officers called to work within public administration (both local and state administration, of course).

We will see that these reflections on the careers mentioned above are quite widespread abroad, above all in the Northern American context. The situation is different with regards to administrative careers, although the problems in this field are just as relevant. Indeed, within administrative organisations we very often find violations of gender rights and freedoms deriving from various types of behaviour that can be described as gender bullying, sexual harassment and gender discrimination. Additionally, the limits for women in the taking on top positions are especially serious now.

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<sup>21</sup> As it was written already in 1987, “Most discussions on legal education do not see the question of what is theoretical and what is practical as a problem. [...] The issue, or them, is how to strike the balance between the theoretical and the practical. Those who favor more practice argue that the balance has been struck too far in favor of theory; those who favor more theory argue that legal education is too professional or practical at the expense of the theory, The point is that all strongly depends from how we choose to define the terms”, see M Spiegel, ‘Theory and Practice in Legal Education: An Essay on Clinical Legal Education’, (1987) 34 UCLA Law Review 578. Some Authors, for instance, criticise the linear connection between practical education and clinics, stating that “Clinical education can be a methodology similar to the case method, or it can be an exploration of theory borrowed from other disciplines similar to legal realism. Clinical education can be considered either theory or practice in the same way that the case method and legal realism can be either. That is, the characterization can be determined more by what features are emphasized and by the perspective of the person answering the question than by the object of the question”, (Spiegel, 594).

## 2. Historical perspective in legal education

Now we aim at underlining some more specific aspects with regards to the question of the ‘historisation’ of legal studies, and the point of the empirical approach to them.

From one point of view, scholars have emphasised the need to rethink the dominant narratives of legal history and the role of the law and gender in producing and reflecting cultural and social norms, because gender methodology could overturn some of the current basic assumptions about citizenship, law, the state and nation building.<sup>22</sup>

This methodological use of gender presupposes a consideration of gender as something different from a mere substitute for the biological category of ‘woman’: in these reconstructions gender becomes a producer of hierarchies, of deep-rooted structures of power. This means that, according to the reflections of some respected authors<sup>23</sup>, gender is certainly one way through which power becomes legitimised. Thinking about the relationships between the evolution of institutions and systems of power, the protection of fundamental rights and freedoms, and gender issues, we realise that the historical reading of many institutional passages and could benefit from an attention to the gender profile.

A very interesting example, drawn from American legal history<sup>24</sup> regards the well-known Dawes Act, adopted by Congress in 1887, by which Congress authorized the President of the United States to survey American Indian tribal land and divide it into lots for individual Indians. Those who accepted a lot and lived separately from the tribe would be granted United States citizenship. This Act broke up Native American Land and conveyed it to individual families, which were presumed to be headed by men. Cott demonstrates how legislative interventions like this one were related to marriage and were profoundly based on gender. The federal legislators sought to transform immigrant families into acceptable male-headed households, and did this by way of an immigration law that allowed only certain

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<sup>22</sup> F Batlan, ‘Engendering Legal History’ [2005] *Law & Social Inquiry* 823.

<sup>23</sup> J W Scott, ‘Gender: A Useful Category of Historical Analysis’, (1986) 91 *The American Historical Review* 1053.

<sup>24</sup> N Cott, *Public Vows: A History of Marriage and the Nation* (Harvard University Press 2000).

types of marriage. Quoting Cott, 'the creation of the Nation passes just through the enforcement of male headed household'.<sup>25</sup> Nation building and the subordination of women are two sides of the coin that represent the cultural reinforcement of consolidated systems of powers and relationships.

We can also mention the *common law* institute of 'coverture' establishing that upon marriage women's legal rights and obligations were subsumed by those of her husband, in accordance with the particular and diminished status of woman: this was enshrined in common law jurisdictions for several centuries and throughout most of the 19th century, creating wives as dependents of men, and affirming men's status and power over women.

Another significant example of the role of law in creating and reflecting separate male and female spheres in society is represented by the notorious case of *Bradwell v Illinois*.<sup>26</sup> In this case, the US Supreme Court ruled that the Fourteenth Amendment did not prohibit a state from denying a woman admission to the legal bar. Concurring, Bradley wrote that:

law, as well as nature herself, has always recognised... the respective spheres and destinies of man and woman. Man is, or should be woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.

He added that the 'destiny and nature of woman is to fulfil the noble and benign offices of wife and mother'. At about the same date, the Wisconsin Supreme Court stated that the qualities of womanhood 'are surely not qualifications for forensic strife'.

In ways like this, the law not only treated men and women differently, but also 'naturalised' distinct spheres for them, even by means of the rules of contract, labour and familial relationships.<sup>27</sup> Moreover, the results of the *Bradwell* case not only reflect gender asymmetries but also give important ideas about the discriminatory nature of legal education, where a woman cannot be considered as a possible

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<sup>25</sup> Ibid, 28.

<sup>26</sup> 83 US 130 (1873).

<sup>27</sup> D Polan, 'Toward a Theory of Law and Patriarchy,' in D Kairys (ed), *The Politics of Law: a Progressive Critique* (Basic Books 1998).

recipient of knowledge and training because of the intrinsic ‘male’ nature of law and its practice.

Furthermore, although in both domestic relationships and family law, issues of women and gender are easily seen, scholars some years ago began to find gender in areas of law that are apparently unrelated to gender, such as tort law and railroad accidents.<sup>28</sup> It is really amazing to observe how, in so many cases, women have been ‘presumed incompetent, governed by emotion rather than reason, and unable to fully comprehend danger’, and because of this kind of consideration women’s contributory negligence was excused by courts and juries. Working in some women’s favour from the point of view of their criminal liability, this standard, reducing a woman’s agency, contributed to crystallising and conveying the stereotype of a woman, and caused her enduring subordination. This mechanism looks somewhat like the present trend of the courts to define certain conduct as culturally based in order to reduce the corresponding criminal liability, but at the same time contributing to the stigmatization of that conduct as being conduct directly linked to a specific ethnic group or minority.<sup>29</sup> The group benefits from the application of the cultural defence (or something similar), but this very application means that the group becomes entangled within the net represented by the values and characteristics ascribed to it by public powers (this is a case of the use of ‘state speech’ to create categories, minorities and classes.<sup>30</sup>

Even civil law systems give us many examples of the inter-relationships between women, society and institutions, and of the relevance of the historical approach in legal studies.

Looking at the case of Italy, we can recall the process of the (legal) unification of the codes after the Italian (political) unification, when the struggle amongst different forms of government resulted in a total defeat for women. The result was the new code that summed the worst

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<sup>28</sup> B Y Welke, *Recasting American Liberty: Gender, Race, Law and the Railroad Revolution 1865-1920* (Cambridge University Press 2001).

<sup>29</sup> See the case of the Rom people, described in P Pannia, ‘Grammatica di un’esclusione: I Rom sotto processo’, (2014) *Studi sulla questione criminale*, forthcoming

<sup>30</sup> O Lee, ‘Classifying Acts: State Speech, Race, and Democracy’, (2001) 8(2) *Constellation* 187; in Italy, we can mention the recent case law concerning Roma people, Cass Pen, decision n. 29734, 04.05.2011; Cass Pen, decision n. 37638, 15.06.2012.

solutions known in the Borbonic Code of the Two Sicilies (1819) and in the Savoy Code of the Realm of Sardinia, whilst there were other possible solutions, much more satisfactory, such as the Austrian Code (1811) that was in force in Lombardy and Veneto.

The new Article 134 of the Code introduced the husband's authorisation for all the acts that woman intended to carry out: women are treated just like incompetents. Married women cannot donate, transfer real estate, mortgage, cede or obtain assets, and so on and so forth, without the husband's authorisation.

We do not focus on the political rights here, this being enough to form a completely separate paper, but only aim at underlining the interest in a study of legal history that uses gender as one of the points of view, maybe even the principal point. Moreover, it is particularly significant that, even after the adoption of the Italian Constitution, equality between men and women has not been completely achieved. Unfortunately the examples are very numerous, but here we focus on one of them, an example that is directly linked to the issue of legal education and to how it affects the actual behaviour of legal practitioners.

A statute adopted in 1956 (n. 1441), regarding the participation of women in the administration of justice by the Italian First Degree Criminal Courts and Tribunals for minors, tried to answer the continual requests made by women's associations and movements for the entry of women into the judiciary system, to match what Article 51 of the Constitution already provided (this provision has been modified and strengthened by the constitutional reform of 2003). This provision is certainly very weak, and the presumed weakness of women is itself codified insofar as Article 25 allows for a woman to be relieved from public office if she needs to provide for the necessities of her family. It is evident how much a statement like this can contribute to reinforcing the paternalistic vision that aims to protect women from engagements that are too difficult and that means substantially excluding them from socially relevant and important appointments.<sup>31</sup>

In the period between 1951 and 1956, many judicial complaints were presented by women who wanted to demonstrate their willingness to

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<sup>31</sup>A M Galoppini, *Il lungo viaggio verso la parità* (Zanichelli 1992).

acquire the right to administer justice. The courts evaded and gave no standing to the constitutional principle of equality, expressing positions that hark back to suggestions in the American case law mentioned above: men and women are not equal, by their very nature; some activities seem to be reserved by nature to men, some other activities to women. Public offices include functions that the supreme natural law and experience discern to be more appropriate for one sex or the other.<sup>32</sup>

The closing speech of the General Prosecutor of the Court of Cassation is amazing in this respect: First, he quoted Ulpiano *'Foeminae ab omnibus officiis civilis remotae sunt, et ideo nec iudices esse possunt nec magistratum gerere nec potulare'*; then he ignored the Constitution, claiming that constitutional norms did not give useful support to the plaintiff, because they were general statements that evidently referred to parliamentary statutes directed at the regulation of specific institutes; and finally, he confessed that a woman has her most desirable mission above all within the family and that in motherhood she sparkles incomparably, but anyway, if she longs to become a judge, her request ought to be received by the legislator, and not by the courts.

This last statement is an example of how the question of the overblown distinction in the Italian Constitution between 'compulsory norms' and 'programmatic norms' (which were, of course, thought to be the most progressive) can be studied using the gender perspective as an impressive catalyst to demonstrate the political intention implicitly to abrogate innovative constitutional provisions.

### **3. Empirical approach v theoretical approach: Abstract and concrete ideas about including women in legal education**

The gender perspective on legal education has been a central topic in the American legal literature for several years. In its early stages the topic was monopolised by feminists, who most often argued for equal professional opportunities on the grounds that men and women are the same: women should have access to legal education because they have the same capabilities as men.<sup>33</sup>

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<sup>32</sup> Court of Appeal of Rome, 29.03.1952, in *Foro it*, 1952, II, 84 ff, confirmed by the Court of Cassation.

<sup>33</sup> D L Rhode, 'Missing Questions: Feminist Perspectives on Legal Education' (1992-1993) 45 *Stanford Law Review* 1547.

Over the last two decades the concept of sameness has been replaced by the aim of exploring and empowering difference, moving towards the evaluation of gender skills and concerns that are generally absent from legal education programmes, and leaving in the background the issue of women's presence in law schools and law departments (which, anyway, has not yet been much investigated). Feminist critiques proceed on the two levels of inadequacies – those that directly concern gender (first of all, the indifference to gender issues in standard courses and texts), and those that raise basic doubts and challenges to the general organisation of legal education.

From the first point of view, many scholars within feminist literature argue that the educational *milieu* is a microcosm that reflects, reinforces, and reproduces asymmetrical gender relations.<sup>34</sup> In particular, it has been underlined how the law school curriculum continues to marginalise or even to withhold issues of concern and interest to women, which are absent from legal studies in a very significant way).<sup>35</sup> It would be simple to transfer American critiques that directly concern gender to the Italian educational context, with much more relevance given to the under-representation of women in positions of greatest academic reward, security and influence<sup>36</sup> and to the lack of interest in issues of gender in standard courses and texts; and with less relevance to the existence of sexually harassing and demeaning conduct and the devaluation of women's classroom participation (but only because of the reasons that we will underline below concerning the general structure of legal education, where participation in the classroom receives a very small endorsement particularly in basic courses).

From the second point of view, a milestone is represented by Gilligan's distinction between an ethics of rights and an ethics of care.<sup>37</sup>

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<sup>34</sup> L Amede Obiora 'Neither Here nor There: of the Female in American Legal Education' (1996) 21 Law and Social Inquiry 355.

<sup>35</sup> N Erickson, 'Sex Bias in Law Course: Some Common Issues', (1988) 38 Journal of Legal Education 101; and N Erickson 'Legal Education: The Last Academic Bastion of Sex-Bias?', (1988) 10 Nova Law Review 457.

<sup>36</sup> We think here, for instance, of the research into women's presence in the highest posts in universities, led by R Frattini and P Rossi, *Report on Women at the Italian University*, <<http://www.df.unipi.it/~rossi/RossiFrattini.pdf>> accessed 05.12.2014.

<sup>37</sup> C Gilligan, *In a different voice: Psychological Theory and Women's Development* (Harvard University Press 1982), see also MF Belenky, B DeVicker Clinchy, N Rule



According to Gilligan's perspective, the ethics of care is very distant from legal studies, and this fact strongly hinges on the abstract attitude of legal education, which rarely translates general principles and rules into concrete cases and life situations to be faced and solved.

Whether the distinction between an ethics of care and an ethics of rights is useful for women is another sensitive issue. Some scholars have claimed that this dichotomy is not authentic and is at the same time derived from and reinforcing the subordinate status of women<sup>38</sup>, particularly because it neglects considerations of race and ethnicity, culture, class, consciousness and all the features that are likely to mediate the 'voice' by which individuals express themselves.

Other scholars have found that the shared experience of institutional oppression and/or racial stratification that informs the construction of self and the formation of identity amongst men and women in specific communities produces a convergence in the vocabulary of rights, morality, and social good.<sup>39</sup> Some suggestions in the literature underline the fact that what relational feminists identify as characteristically feminine (versus masculine) personalities, ontologies, epistemologies, and worldviews bears a remarkable resemblance to what other cultures categorise as non-Western (versus Western) personalities and worldviews.<sup>40</sup>

It is evident that theory and practice also affect the methodology of the consideration of women in legal education, and the corresponding instruments. It is just the comparison between theory and practice that shows that 'what most feminists want from legal education looks much like what other informed critics have wanted'<sup>41</sup>, and that:

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Goldberger, and J Mattuck Tarule., *Women's Ways of Knowing* (Basic Books 1986); S Ruddick *Maternal Thinking: Toward a Politics of Peace* (Beacon Press 1989); and N Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (1984).

<sup>38</sup> CA MacKinnon, *Feminism Unmodified. Discourses on life and law* (Harvard College 1987).

<sup>39</sup> CB Stack, 'Different Voices, Different Visions: Gender, Culture and Moral Reasoning' in M Zinn, B Dill (eds), *Women of Color in U.S. Society* (Temple University Press 1994).

<sup>40</sup> S Harding, 'The Instability of the Analytical Categories of Feminist Theory' in MR Malson, JF O'Barr, S Westphal-Wihl and M Wyer (eds), *Feminist Theory in Practice and Process* (University of Chicago Press 1991).

<sup>41</sup> DL Rhode, 'Missing Questions: Feminist Perspectives on Legal Education' (1992-1993) 45 *Stanford Law Review* 1548.

obvious examples include the call by realists and clinicians for law schools that focus more on practical lawyering skills; the demands by humanists and critical theorists for less hierarchical and less authoritarian teaching techniques; the argument of law and society leaders for more contextual analysis and interdisciplinary teaching materials.<sup>42</sup>

The comparison between theory and practice confirms that the traditional law school format assumes that learning is a rational, largely unidirectional process; that professors try to transmit knowledge about what law is and does through reasoned discourse; and that at the end students attempt to replay this account in their final exams.<sup>43</sup> All these features seem to allow an appreciation of the theoretical framework built by Gilligan.

We do not know whether only women reason in a ‘different voice’, are less likely to privilege abstract rights over concrete relationships, and are more attentive to values of care, connection, and context.<sup>44</sup> In any case, this ‘different voice’ certainly exists, and could bring a distinctive perspective to the resolution of human problems, one that is silenced by the ‘competitive, combative, and a contextual structure of legal education’.<sup>45</sup> On this point we need to distinguish between the common law context and the civil law context. In the US a substantial problem is that the educational structure at most law schools strengthens students’ competitive capacity to the exclusion of other attributes, particularly because of the dynamics that characterise the relationships within the classrooms. These considerations are not applicable to the Italian legal educational system, where the less interactive method of teaching makes it impossible to favour rational and competitive men over empathetic and prismatic women.

However, just because there is a need for greater concreteness in legal education, which is hardly present in the Italian system, there ought to be a common commitment to more co-operative and empathetic training, and this would affect academic structures and content in

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<sup>42</sup> Ibid, 1552.

<sup>43</sup> SH Williams, ‘Legal Education, Feminist Epistemology, and the Socratic Method’, (1993) 45 Stanford Law Review 1571.

<sup>44</sup> C Gilligan, *In a Different Voice: Psychological Theory and Women’s Development*, *op cit.*

<sup>45</sup> DL Rhode, *op cit.*

various ways. In terms of academic structure, a special emphasis would be given to legal clinics, simulations and other settings for interactive, experimental learning. Collaborative projects and the development of interpersonal skills would occupy a more central role in standard courses and evaluation processes. In terms of content (which is what we are going to investigate in the next section) dimensions such as gender, race, class, ethnicity, and sexual orientation would become more central categories in the analysis of legal institutions, the protection of rights and the organization of power.

Legal education would not simply need to acknowledge the differences, but would need to have an exploration of the processes that give rise to the social meaning and consequences of those differences.<sup>46</sup>

In Italy, another aspect to be underlined regards the management of the ‘Scuola per la magistratura’ (a new school for the judiciary), which was recently created by a governmental decree, n 26/2006 and effectively began in 2012. Not only is the number of women on the executive committee definitely small (two out of twelve), but also, from the point of view of content, there are very few lessons on gender issues or issues even partially linked to gender. Analysing the curriculum in 2013, the continuing education only includes a lesson on criminal protection against stalking and bullying (and, furthermore, this is supplied by e-learning). Considering that basic legal education is not ‘genderised’, the absence of gender issues and a gender perspective in specialised training is much graver.

This reflection on content is particularly significant, and we will take it into consideration in the next section. For now, it is important to remind ourselves that the very approach to the law should change, considering that (for historical reasons) the law presupposes a mythical creature: a coherent, rational legal subject, capable of freely choosing and consenting to a wide range of options and capable, under normal circumstances, of being considered totally responsible for its actions.<sup>47</sup> Indeed, in Europe as in the US, the legal subject is modelled on a

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<sup>46</sup>B Ong Hing, ‘Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses’ (1992-1993) 45 *Stanford Law Review* 1807.

<sup>47</sup>MV Rodriguez, ‘Pedagogy in Law: Ideas for Integrating Gender Into Legal Education’ [1998-1999] *American University Journal of Gender Social Policy and the Law* 267

white, heterosexual, middle to upper class male with no disability. He is the male bourgeois landowner whom we find in the Napoleonic Civil Code. The social contract itself is modelled around this kind of subject.<sup>48</sup>

#### 4. Proposals

First of all, if it is not already evident, why should a feminist legal curriculum or gender courses, be introduced?

In Italy, until now, the terminological issue has found no place, because there is no experience that could be ascribed to the 'genderisation' of legal education that we have been talking about. Our investigation reveals that the only current course on 'Law and Gender' is an optional course at the University of Trento that is taught by professors of private comparative law. Of course, we do not consider as relevant to our investigation all the (existing) courses on gender (from an anthropological, historical, philosophical and sociological perspective) that are included in programmes that, even when they can be followed in law departments, are not directed at training students to become attorneys, prosecutors, judges and notaries. We mean that the field of our analysis is specifically the role of gender in legal curricula curricula that lead to the participation in public examinations from which the professionals mentioned above are selected.

An English expert scholar has underlined three basic reasons that make gender and feminist studies necessary in the field of legal studies.<sup>49</sup> Firstly, there is the high number of women amongst law students and practitioners. In the United Kingdom (where the paper was written) more than half of all law students and more than half of all entrants to the legal profession are women. The data is quite similar in Italy, and, in any case, more than half the population of the world are women. This quantitative element ought to be reflected in legal curricula, starting with the breaking of the traditional distinction

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<sup>48</sup> M Nussbaum, *Frontiers of Justice*, (Belknap Pr 2007). Critiques towards contractualism from the point of view of feminism are clearly expressed in C Pateman, *Sexual Contract* (Stanford University Press 1988), where she underlines that 'In contract theory universal freedom is always a hypothesis, a story, a political fiction. Contract always generates political right in the forms of domination and subordination', above all against women.

<sup>49</sup>R Auchmuty, 'Agenda for a Feminist Legal Curriculum in Legal Studies', (2003) 3 Legal Studies 23.

between compulsory and optional subjects that marginalises matters that are central to the growth of gender consciousness: family law (always optional), and women's legal history (which is definitely not taught, even within the context of general legal history, where an inclusion of the gender perspective would be preferable).

The effect of this absence is strongly seen in the lack of a female perspective in many judgments in which such a perspective would be significant for the resolution of the concrete case. The female perspective seems to be very hard to achieve, because there is a complete overlap between the perspective of men and the perspective of the law.

The second reason is the relevance given in our legal systems to the equality principle:

It is in the law school that the values, ethics and principles of the law and the legal profession are first introduced, developed and inculcated. And, it is the law students of today who will become the lawyers, academics and judges of tomorrow and who will, therefore, exert a considerable influence on both the role and status of women lawyers, and on the ways in which the law itself interacts with women's lives.<sup>50</sup>

This claim perfectly illustrates the relationship between gender, equality, law and justice.

The third reason concerns the fact that while discrimination varies between countries, peoples, geographic places and cultures, 'evidence of the continued global oppression of women remains overwhelming'.<sup>51</sup> This evidence should be challenged by the law, which we believe is the social weapon called on to eradicate women's subordination and to give full implementation to the equality principle.

After we have considered all these points, at the end of this section we have to focus on possible proposals. The question is how gender can be integrated into legal education. What strategies can render legal education more able to develop public awareness of the role of gender in social relationships and dynamics of power, and to produce legal

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<sup>50</sup>C McGlynn *The Woman Lawyer: Making the Difference* (Butterworths 1998), 27.

<sup>51</sup>J Conaghan 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 *Journal of Legal Studies* 354.

professionals who would make gender relevant in the recognition and protection of rights?

Feminist legal theorists propose three methods.<sup>52</sup> The first method is ‘the woman’s question’: this means that students should be called to identify the gender implications of rules and practices that appear to be neutral and objective. The second is practical feminist reasoning: this reasoning consists in posing open-ended questions about concrete issues in order to determine both the possible solution and the problem that is actually found in the situation under consideration. In this way students can identify different points of view and perspectives that may be far from the systems of values prevailing in society. The third method is the raising of consciousness, which can be interpreted as an interactive and cooperative process in which women share and compare their personal experiences.<sup>53</sup>

All these ‘gender factors’, useful for building a different methodology, are reinforced by giving a special role to legal clinics<sup>54</sup>, where students are asked to offer pro bono assistance in cases with a high public

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<sup>52</sup>K Barlett, ‘Feminist Legal Methods’, in K Barlett and R Kennedy (eds) *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991).

<sup>53</sup>K Barlett, *ibid.*

<sup>54</sup>In Italy only three legal clinics have been launched in the last years. The first optional course in Legal Clinic started at the Faculty of Law of the University of Brescia, during the academic year 2009/2010, as an experiment. It was promoted by a group of legal scholars engaged in innovative teaching methodologies within the field of legal education and it was led in collaboration with very important American Legal Clinics such as the ones operating at the Yale Law School, the New York University Law School, the CUNY Law School and the University of Connecticut Law School. The other two legal clinics operate at the University of Rome Tre and the University of Turin.

At the University of Rome Tre was opened a public legal desk specialised in immigration and human rights, where people offer concrete cases to be analysed and treated by young legal students who render legal assistance to disadvantaged persons. Small groups of students, supervised by law professors and lawyers, follow the cases and participate to the judicial hearings, although they cannot legally represent their assisted. Generally, the cases are recommended by associations, labor unions and religious charity organisations.

Even the University of Turin opened in 2013/2014 a legal clinic in ‘Person and family’, where students could deepen their knowledge of family law and protection for ‘weak adults’ through this new methodological approach. The Law Department has made an active participation in the course has been made equal to having passed the exam in family law.

impact, such as those that expose unconstitutional practices or the systematic subordination of and discrimination against women. It is important that students work on cases that demonstrate the role of the law in changing society, beliefs and conventional wisdom.

Recently, the roadmap for integration has been presented in four steps: the inclusion in legal departments, faculties and law schools (to which, in Italy, we could certainly add the ‘Scuola di magistratura’ mentioned above) of instruments like a gender audit, self-assessment exercises or a gender needs assessment; the sensitisation of gender terminology; the inclusion of exercises for confronting stereotypes, through the students writing a story on a gender value conflict (real or hypothetical) and then analysing and discussing the stories; and the integration of gender and anti-discrimination courses and modules into the curricula.<sup>55</sup>

The role of the practical approach becomes much more evident when we think about some of the recent Italian provisions that we considered in the previous paragraphs, such as those concerning ‘femminicidio’ or political representation and quotas.

Our first main point is that if there is the possibility for legal students to have direct experience of concrete cases concerning gender violence, and to employ theoretical instruments in order to guarantee the wider protection of women's fundamental rights and freedom, then this could produce legal practitioners in the future who have a gender consciousness. This feature is crucial, above all, for some professionals, such as police officers, and in the exercise of general public safety functions. Many studies have underlined how the intrinsic elbow room that characterises law enforcement risks working to the detriment of women and minorities. As an example, domestic violence is still considered by police officers as an ‘unproductive, messy and not real’ field of work.<sup>56</sup> Police officers, although they often have to intervene in this kind of crime, also tend to manage them outside the roadmaps and instruments provided by the criminal procedure code, even when

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<sup>55</sup> OL Odigie-Emmanuel, ‘Gender and Racial Issues in Legal Education: Law as Mechanism for Social Control’ (2013) Global Alliance for Justice Education conference, Jindal Global Law School, < [www.gaje.org/conferences/7th-worldwide-conference/](http://www.gaje.org/conferences/7th-worldwide-conference/) > accessed 10.12.2014.

<sup>56</sup> R Reiner, *The Politics of the Police* (Oxford 2010), 172

violence is evident. Another problematic feature concerns the treatment of women who have suffered rape: many sociological and criminological studies have underlined an insensitive and sometimes hostile attitude by some police officers. Clearly, the basic level of the services of law and order is performed by people who have not had legal training, and very often they do not have a Master's degree in law, but those at the higher level of command and control have received an academic education, usually in law. These managers should therefore have the responsibility of organising training programmes for their subordinates that include gender topics, and they need to be well aware of the issue in order to be proactive and undertake the necessary measures.

Our second point is that the habit of considering the participation of women in politics, and more generally in society, in work and in the 'free marketplace of ideas', desires and ambitions, as essential and undeniable to be needs to be built through a long training process, where a fundamental role is played by legal education. An education based firmly on affirmative action and substantial equality would improve the capacity of students (and future legal practitioners) to recognise the need for public interventions to promote and guarantee a female presence in political institutions and governments and in all places where crucial decisions are taken. And it would prevent, for the future, legal scholars from making (sometimes) unintentional references to the principle of equality in such a way that limits women's rights while formally pretending to guarantee equal treatment for men and women, starting from the misleading presupposition that parity between men and women has been achieved.

Of course, the educational approach chosen in this paper also reminds us of the importance of a continuing legal education that connects the boundaries of law schools and departments to the judicial environment which, for instance, is recognised by legal doctrine as a fundamental agent of change.<sup>57</sup>

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<sup>57</sup> L Armytage, 'Judicial Education on Equality' (1995) 58 (2) *Modern Law Review* 160 underlines how the US model of judicial education focuses on the role of attitudes and values in judicial decision making, supported by examples relating to a range of disability types.



We cannot spend time on the first point, as that would require a specific investigation. Instead, we dedicate the final reflections of this third section to the legal curriculum and how it might be modified in order to pursue the goals set out in this paper.

The appropriate consideration from which we want to start seems very obvious: the effect of designating some subjects as compulsory and others as merely optional is naturally to depreciate the latter subjects. A worse case is, of course, the absence of a subject from the curriculum, which is what happens in the case of Gender and Law. Anyway, looking at the Italian context, the Master's degree in law needs a broadly-based compulsory curriculum that includes subjects like family law (which is currently optional), women's legal history, and courses on gender, race and sexuality perspectives; this would encourage a study of law that started from the person and not from the legal category.<sup>58</sup> This approach to radical topics and perspectives would promote a different way of thinking in students (especially in the excellent students who are now chiefly relegated to a passive and often mnemonic learning of legal categories, notions and case law): a critical, empathetic reasoning that will allow students to acquire methodological skills that they will be able to apply across their studies and in future research and legal activities.

Transforming the curriculum also means another basic thing: adding a few subjects that are considered to be particularly close to women because of their content and their specific topics would not be sufficient to change the general structure of legal education, and the way the compulsory subjects are delivered.

Every subject ought to be delivered through a binary approach: after students have learned the positive law and statutes, legal doctrine and case law, in the way that is particular to the various disciplines, they ought to be asked to consider the law from other standpoints, learning to do so from their professors, who should show them how cultural diversity and inclusiveness can affect the reading of law, of rules, and of decisions.<sup>59</sup>

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<sup>58</sup>See the considerations of R Auchmuty, 'Agenda for a Feminist Legal Curriculum in Legal Studies', (2003) 3 *Legal Studies* 23.

<sup>59</sup>NKS Banks, 'Pedagogy and Ideology: Teaching Law as if it Really Matters' (1999) 19 *Legal Studies* 450.

#### IV. CONCLUDING REMARKS

In this paper we have described the necessity of a deep reflection on the inclusion of gender issues, and above all gender perspective, in legal education. We have described criticalities and already existing experiences, and proposed some possible methodologies, paying attention to the relevant differences between civil law and common law systems of legal professions and training.

Indeed, the predominant indifference towards considering gender as a legal matter, deserving time and space in legal programmes, seems basically to need three interventions: (1) a cross teaching of gender topics in (existing) general courses; (2) the inclusion of gender topics within (existing) general courses on fundamental rights; and (3) specific courses on law and gender.

The goal of social inclusion is particularly important within the perspective of this work, because it becomes much more relevant during the crises, when excluding policies prevail over the protection of social rights and over the achievement of equal opportunities. Studying gender equality and equal opportunities within a context of economic and social crisis serves to debunk the false perception that gender equality may be an important aim to achieve, but not in times of crisis when societies and governments should concentrate on creating economic growth.

We believe, and have to demonstrate, that education has a strong role in influencing women's choices for their future learning, working and building a social and professional status. Above all, we want to underline the role that legal education in particular assumes. It is a double role: from one side legal education represents the background and the training for the future lawyers, judges, public employees asked to give implementation and enforcement to fundamental rights and liberties, putting into effect gender equality and the recognition of subjectivities. Going even further, legal education constitutes an important channel of awareness even for lawmakers, that mainly come from schools of law: the endurance of gender biases and the limits in the legislative promotion of equal opportunities is telling from the lack of the gender perspective in legal curricula.